IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1939.

No. 397

UNITED STATES OF AMERICA,
Appellant,

vs.

THE BORDEN COMPANY, ET AL.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

BRIEF OF APPELLEES, HUNDING DAIRY COMPANY, a corporation, CARL W. HUNDING and LELAND SPENCER.

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INTRODUCTORY STATEMENT

On page 38 of its brief, the government states: "The acts charged in the indictment were committed *at a time when there was no* marketing agreement or *order in effect in the Chicago market*" [Italics supplied]. This statement of purported fact cannot stand unchallenged. The fact

is that a license[1] issued by the Secretary of Agriculture under the provisions of the Agricultural Adjustment Act of 1933 was in effect in the Chicago market at the time the supposed conspiracies are alleged to have been entered into and for some time thereafter.

The existence of this fact, judicially known to the court, constituted one of the grounds upon which these appellees,[2] and certain other defendants,[3] challenged the indictment in the court below.

Briefs are being submitted on behalf of other appellees answering the principal contentions urged by the government in its brief and also urging additional grounds for sustaining the action of the court below. We find no occasion to reargue or enlarge upon the points discussed in such briefs and shall therefore limit this brief to a discussion of the effect of the Licenses upon the validity of the allegations of the indictment. However, we are opposing jurisdiction of this appeal, further consideration of which the Court has postponed to the hearing on the merits.

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[1] Under Section 8(3) of the Act of May 12, 1933, (48 Stat. 35), the Secretary of Agriculture was empowered to issue licenses for the handling of agricultural commodities. The Act of August 24, 1935, amending the Agricultural Adjustment Act changed the word "licenses" to "orders" (49 Stat. 753).

[2] Motion to quash and demurrers of Hunding Dairy Company (par. B(a), R. 43); Leland Spencer (par. 27, R. 89).

[3] Motion to quash and demurrers of Capitol Dairy Company (par. II 5, R. 48); Sidney Wanzer & Sons, Inc. (par. 6, R. 55); International Dairy Company (par. 6, R. 51); Gordon B. Wanzer (par. 6, R. 52); H. Stanley Wanzer (par. 6, R. 54); Louis Janata (par. 6, R. 57); Milk Dealers' Bottle Exchange (par. 6, R. 67); Western-United Dairy Company (par. 6, R. 58); United Dairy Company (par. 6, R. 61); Western Dairy Company (par. 6, R. 60); Louis G. Glick (par. 6, R. 63); Maurice S. Dick (par. 6, R. 64); Samuel S. Dick, (par. 6, R. 66); Associated Milk Dealers, Inc. (par. 15, R. 72).

THE ISSUES UPON THIS APPEAL ARE NOT LIMITED TO THE GROUND UPON WHICH THE COURT BELOW ACTED.[4]

The government contends that the only question open to review by this Court is whether the acts charged in the indictment are excluded from the purview of the Sherman Act on the grounds found by the court below. Even if the government's contention were sound, the misstatement of fact in the government's brief, set forth on page 1 hereof; would justify the contention which we are advancing.

However, the government overlooked the recent decision of this Court in *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, where a similar contention by the government was rejected (p. 329):

> "The government contends that upon an appeal by the United States under the Criminal Appeals Act from a decision holding an indictment bad, the jurisdiction of the court does not extend to questions decided in favor of the United States, but that such questions may only be reviewed in the usual way after conviction. We find nothing in the words of the statute or in its purposes which justifies this conclusion. * * * The judgment of the lower court is that the statute is invalid. Having held that this judgment cannot be sustained upon the particular ground which that court assigned, it is now open to this court to inquire whether or not the judgment can be sustained upon the rejected grounds which also challenge the validity of the statute and, therefore, constitute a proper subject of review by this court under the Criminal Appeals Act."

The principle deducible from the foregoing decision is that on an appeal by the United States under the Crim-

[4] Since the Court has reserved the question of jurisdiction of the government's appeal, we make this argument without prejudice to grounds urged in opposition to such jurisdiction.

inal Appeals Act this Court may review any ground urged in the lower court, whether or not sustained by that court, provided such ground constitutes a proper subject of review under the Act. The test in such a case is whether the government could have appealed under the Criminal Appeals Act if the particular ground advanced for review in this Court had been sustained by the court below.

Applying this test to the ground we are urging in support of the judgment below, which the court overruled *pro forma*, it would seem beyond question that the government would have had the right to appeal had the court based its judgment upon such ground. Our challenge to the indictment presents the question whether facts, which are judicially known, bar this prosecution by indictment under the Sherman Act. It differs from a plea in bar only in the respect that the matters urged in bar were judicially known and hence did not require pleading but could be raised upon motion or demurrer. We further suggest that this ground alone of those upon which the indictment was challenged, if it had been sustained below, would have been reviewable as a judgment sustaining a plea in bar.

SUMMARY OF ARGUMENT.

I.

This Court does not have jurisdiction under the Criminal Appeals Act for the following reasons:

The judgment of the District Court was not based upon the construction of Section 1 of the Sherman Act but upon the application of the Agricultural Acts to counts of the indictment which that court held otherwise sufficient to state offenses under the Sherman Act.

Jurisdiction cannot be sustained on the ground that the judgment below was one sustaining a special plea in bar, for the reason that no special pleas in bar were either filed or sustained. The demurrers which were sustained cannot be held to be equivalent to special pleas in bar for an issue of law, not of fact, was tendered by such demurrers.

The appeal should be dismissed as to the appellees Hunding Dairy Company and Carl W. Hunding for the reason that it does not affirmatively appear on the face of the judgment below that as to said appellees it was one within the purview of the Criminal Appeals Act.

II.

The Court will take judicial notice of the Licenses for the Chicago market issued by the Secretary of Agriculture under express statutory authority. The fact that in January, 1935, the government, by the License then

in force, fixed prices to be paid producers and enforced the base-surplus plan of production, is wholly at variance with the allegations of Counts One and Four of this indictment. The fact that the Secretary discontinued the fixation of resale prices, while he continued actively to regulate the market, amounts to an approval of the acts charged in Count Two. When the Secretary terminated the Licenses, he approved the continuance of the practices thereby enforced.

The legal effect of the enforcement by the Licenses of the acts charged to the defendants and the continuance of such activities with the approval of the government bars the prosecution of the charges in this indictment.

The Sherman Act cannot be construed to demand the prosecution of the defendants by this indictment in the face of facts judicially known to the Court which render this indictment at once inconsistent with public policy and abhorrent to the sense of justice.

The dismissal of the indictment was proper for such facts judicially known justify the conclusion that this particular indictment lies outside the purview of the Sherman Act.

ARGUMENT.

I.

THIS COURT DOES NOT HAVE JURISDICTION UNDER THE CRIMINAL APPEALS ACT.

The government contends that this Court has jurisdiction of the appeal under the Criminal Appeals Act upon the ground that the judgment of the District Court was based upon the construction of Section 1 of the Sherman Act. The government itself is somewhat doubtful as to jurisdiction upon the above ground and suggests that jurisdiction may be sustained on the ground that the judgment of the court below is one sustaining a special plea in bar. These appellees contend that jurisdiction of this Court cannot be sustained upon either ground.

A. *The judgment of the District Court was not based upon the construction of Section 1 of the Sherman Act but upon the application of the Agricultural Acts to counts of the indictment, which that Court held otherwise sufficient to state offenses under the Sherman Act.*

The government relies upon the opinion of this Court in *United States* v. *Patten*, 226 U. S. 525, to sustain its contention that the judgment below was based upon a construction of the Sherman Act. That case does not aid the government's contention for the decision there reviewed was that the acts charged in the indictment were not within the condemnation of the Sherman Act, which necessarily, as this Court held, required a construction of that Act to ascertain what it condemned.

Exactly the converse appears from the record in the instant case. As stated by the government, the court below overruled all grounds challenging the counts under consideration other than the ground that the Agricultural Acts had the effect of removing the production and marketing of milk from the purview of the Sherman Act. That the court below did not construe the Sherman Act in arriving at its decision is virtually admitted by the government on page 12 of its brief, for it says:

> "It is clear, therefore, that the case comes before this Court in the posture of an indictment sufficient to state an offense in all respects in the manner charged, unless the acts charged in those counts are excluded from the purview of the Sherman Act on the grounds found by the District Court."

If then the court below held that such counts were sufficient to charge offenses under the Sherman Act, while its decision in that respect may be said to have involved a construction of the Sherman Act,[a] *that is not the decision from which the government appealed.* The judgment from which the appeal is taken is one dismissing counts sufficiently charging offenses under the Sherman Act except for the effect given by the court to wholly unrelated Acts. Since the exception upon which the judgment was based was not one contained in Section 1 of the Sherman Act, the application of such exception to this indictment did not involve a construction of that Act.

It is apparent, therefore, that the decision of the District Court was based upon its construction and interpretation of the Agricultural Acts and the resulting application thereof to the counts which it dismissed.

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[a] Cf. *United States* v. *Patten*, 226 U. S. 525.

B. *Jurisdiction cannot be sustained on the ground that the judgment below was one sustaining a special plea in bar.*

The government does not argue its *suggestion* that jurisdiction may be sustained on the ground that the judgment of the District Court is one sustaining a special plea in bar, other than to cite certain authorities which are readily distinguishable as hereinafter shown. The explanation for the rather vague and indefinite treatment accorded this suggestion by the government lies in the fact that the record shows that no special pleas in bar were filed by any of the defendants in this case[b] and hence none was sustained by the court below. The government's position in this respect is not aided by the fact that throughout the various documents filed upon this appeal and in its Specification of Errors in its brief, it repeatedly refers to the action of the court "in sustaining said demurrers, motion to quash and special pleas." (R. 97.)

The only intimation as to the government's contention concerning a "special plea in bar" is to be found in the authorities cited on page 22 of its brief. These cases hold that the Court will consider the essential nature of a pleading, rather than the designation given it, to ascertain whether it is in substance a special plea in bar. From this we deduce that the government is suggesting that the demurrers which the court below sustained were in substance special pleas in bar. If this is the basis of the suggestion of the government, we

[b] The fact that no special pleas in bar were filed can be readily ascertained by reference to the "Praecipe for transcript of record" filed by the government (R. 118, 119), an examination of which will fail to disclose any special plea among the documents listed.

suggest that its "argument" thereon is answered by the opinion in *United States* v. *Halsey, Stuart & Co.*, 296 U. S. 451, wherein the Court said:

> "We find no basis for the contention that the defendants' motion to quash was in substance a 'special plea in bar' within the meaning of the Criminal Appeals Act."

In *United States* v. *Storrs*, 272 U. S. 652, the Court held that a plea in abatement could not be converted into a "special plea in bar" by reason of the fact that the Statute of Limitations had run prior to the time the plea in abatement was sustained by the lower court. The Court in an opinion by Mr. Justice Holmes, said with respect to the Criminal Appeals Act (p. 654):

> "The statute uses technical words, 'a special plea in bar' and we see no reason for not taking them in their technical sense."

If then a demurrer or motion to quash is held to be the equivalent of a special plea in bar, it can only be so when an issue of fact is tendered thereon, for technically a special plea in bar always raises such an issue, whereas a demurrer tenders an issue of law. It is true that the facts raised in bar may be admitted, for the reason they are contained in the opponent's pleading or are matters judicially noticed. In such cases the issue may be made upon a motion or a demurrer, but the bar arises from the facts in whatever form they are set forth.

In the instant case the demurrers which were sustained tendered an issue of law, *i. e.*, the effect to be given upon the application of statutory law to the indictment. There is no basis for the claim that such demurrers raised fact issues of any sort in bar of the prosecution and there-

fore jurisdiction cannot be sustained on the ground that these demurrers were equivalent to special pleas in bar.

C. *It does not affirmatively appear that the judgment below dismissing the indictment as to the defendants Hunding Dairy Company and Carl W. Hunding was as to said defendants one within the purview of the Criminal Appeals Act.*

The appellees Hunding Dairy Company and Carl W. Hunding have filed a motion to dismiss the appeal as to said appellees upon an additional ground, which is not applicable to the appellee Spencer for reasons to be stated.

The record discloses that the court below did not sustain the motion to quash and demurrer filed by these appellees,[c] as to any of the three counts under consideration (R. 115-118). The order and judgment appealed from dismissed the indictment as to all defendants (R. 118), which necessarily included these appellees. But there is no affirmative showing on the face of said order that the judgment dismissing the indictment as to these appellees was one within the purview of the Criminal Appeals Act. In *United States* v. *Hastings*, 296 U. S. 188, 192, this Court held that jurisdiction of appeals by the government in criminal prosecutions was confined to the cases enumerated therein, and cited the fact that a proposal to confer a broader jurisdiction was considered by Congress and rejected.

Prior to the enactment of the Criminal Appeals Act, this Court in *United States* v. *Sanges*, 144 U. S. 310, 312, after reviewing numerous decisions of state courts, held

[c] As used in this Point I-C "these appellees" refers solely to Hunding Dairy Company and Carl W. Hunding.

that the government had no right to review a judgment in favor of the defendant in a criminal case, except under and in accordance with express statutes, whether the judgment was rendered upon a verdict or the sustaining of a demurrer or motion to quash.

Since the Criminal Appeals Act confers an exceptional right to review in favor of the government, it must be construed strictly, as was held in *United States* v. *Dickinson*, 213 U. S. 92, at page 103:

> "So far as that statute is an innovation in criminal jurisdiction in certain classes of prosecutions, it cannot be extended beyond its terms."

The jurisdiction of this Court to review judgments of state courts of last resort is likewise limited by the statutory provisions conferring such jurisdiction. In *Whitney* v. *California*, 274 U. S. 357, this Court set forth the long established rule as to such jurisdiction, on page 360:

> "It has long been settled that this court acquires no jurisdiction to review the judgment of a state court of last resort on a writ of error, *unless it affirmatively appears on the face of the record* that a Federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such state court." [Italics supplied.]

And in *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648, it was held (p. 655):

> "Upon like grounds the jurisdiction of this court to reexamine the final judgment of a state court cannot arise from mere inference, . . ."

The principles stated in the above cases are applicable to appeals under the Criminal Appeals Act (Cf. *United States* v. *Hastings*, 296 U. S. 188, at page 193), and there-

fore in such cases the judgment appealed from must show on its face, not as a matter of inference, but affirmatively, that it is one within the purview of that Act as to all of the appellees.

In *United States* v. *Carter*, 231 U. S. 492, this Court dismissed for want of jurisdiction an appeal by the government from a judgment sustaining a demurrer to certain counts because they were "bad in law." The Court refused to accede to the government's proposition that the entire record should be examined to determine the question of jurisdiction under the Criminal Appeals Act, saying on page 493:

> "But the right to a review in a criminal case, being controlled by the general law, it follows that a case cannot be brought within the control of the special rule provided by the criminal appeals act *unless it clearly appears that the exceptional, and not the general, rule applies.*" [Italics supplied.]

Applying the principles of the foregoing cases to the judgment appealed from, which dismissed the indictment as to these appellees, it does not affirmatively appear that said judgment *as to these appellees* was based upon any of the grounds specified in the Criminal Appeals Act.

The "Specifications of Errors to be Urged" in the government's brief (pp. 12-15) reveals that but one of the alleged errors so specified relates to any action by the court below affecting these appellees. The first specification (pp. 12, 13) alleges error in sustaining the various demurrers, motion to quash and special pleas of named defendants, including these appellees, to Counts One, Two and Four. Neither this specification nor the one following (pp. 13, 14), which refers to "*said* demurrers, motions to quash, and special pleas", is supported by the record as to these appellees, for the court below did not sustain

their motion to quash and demurrer to Counts One, Two and Four (R. 115, 116). In like manner, the third specification of error (pp. 14, 15), which concerns the action of the court below upon demurrers of the Pure Milk Association and other defendants, not including these appellees, has no application to these appellees. It appears, therefore, that only the fourth specification of error (p. 15) alleging that the court erred,

> "In dismissing Counts One, Two, and Four of the indictment in the above entitled cause as to all of the defendants,"

applies to these appellees.

However, said fourth specification, above quoted, is as defective as the judgment at which it is directed, in not affirmatively showing that the dismissal of the indictment as to these appellees was based upon a ground enumerated in the Criminal Appeals Act.

Under the authorities cited, the appeal as to these appellees cannot be brought within the exceptional rule of the Criminal Appeals Act in the absence of an affirmative showing upon the face of the judgment that it applies, and we therefore submit that the appeal should be dismissed as to the appellees, Hunding Dairy Company and Carl W. Hunding.

II.

THE DISMISSAL OF THE INDICTMENT WAS PROPER, FOR FACTS JUDICIALLY KNOWN SHOW THAT THE GOVERNMENT ITSELF COMPELLED THE ACTS WHICH THE DEFENDANTS WERE CHARGED WITH CONSPIRING TO DO.

The court below held that *no* indictment will lie under section 1 of the Sherman Act with respect to the marketing of agricultural products, including milk, because the

production and marketing of agricultural products are removed from the purview of the Sherman Act by the Act of May 12, 1933 as amended and reenacted (R. 115). However, with respect to the counts of *the particular* indictment here under review, it is not essential to the affirmance of the judgment of the District Court that the broad proposition upon which that court acted be sustained.[5] The application to these counts of facts judicially known shows that the dismissal thereof was proper under the very arguments by which the government in its brief seeks to avoid the decision of the court below,[6] *i. e.* there must be immunity from prosecution under the Sherman Act where the government either compels or approves acts which are alleged to constitute a violation of the Sherman Act. On page 29 of its brief, the government again incorrectly states that no regulation under the Agricultural Acts was in effect when the acts charged in the indictment were committed, but it virtually concedes that the Sherman Act has no application to activities covered by the License [which was in effect], in the following statement:

> "The purpose of this aid is to secure parity prices to farmers, without destroying competition or *preventing the application of the Sherman Act to activities in the distribution of the product not specifically covered by marketing agreements or orders.*" [Italics supplied.]

We contend that by imposing and enforcing licenses under the authority of the Agricultural Adjustment Act, the government did, and compelled the defendants to do, the very acts which its indictment charges that the de-

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[5] In making this statement, we do not intend to detract in any wise from the arguments presented in briefs of other appellees in support of the holding of the court below.

[6] See Government's Brief, Point II, C, 2 (pp. 37-40).

fendants conspired to do. Our contention resolves itself into this question: Can acts in compliance with an executive order having the force of law be the subject of an indictment under another law?

A. *The Court will take judicial notice of the Licenses issued by the Secretary of Agriculture under express statutory authority.*

Except for the fact that the government questioned the right of the court below to take judicial notice of these Licenses, we would not deem it necessary to argue that proposition. Such Licenses were issued by the Secretary of Agriculture under authority vested in him by the Agricultural Adjustment Act. It would seem self-evident that executive orders having the force and effect of law are as much the subject of judicial notice as the Act which authorized the issuance of such orders.

The leading case on the subject of judicial notice in this Court is *Jones* v. *United States*, 137 U. S. 202. In that case, in which judicial notice was taken of proclamations, correspondence and records of the head of an executive department, this Court considered the effect of the facts so judicially noticed upon the allegations of the indictment there involved, saying (p. 216):

> "These allegations, indeed, if inconsistent with facts of which the court is bound to take judicial notice, could not be treated as conclusively supporting the verdict and judgment."

In *Heath* v. *Wallace*, 138 U. S. 573, following the *Jones* case this Court said (p. 584):

> "We think we may take judicial notice of such official statements made by the head of one of the branches of the executive department, especially as they relate to the public records under his control."

More specifically with respect to the particular matter of judicial notice here presented, this Court held in *Caha* v. *United States*, 152 U. S. 211, at page 222:

> "Questions of a kindred nature have been frequently presented, and it may be laid down as a general rule, deducible from the cases, that wherever, by the express language of any Act of Congress, power is entrusted to either of the principal departments of government to prescribe rules and regulations for the transaction of business in which the public is interested, and in respect to which they have a right to participate, and by which they are to be controlled, the rules and regulations prescribed in pursuance of such authority become a mass of that body of public records of which the courts take judicial notice."

Any remaining doubt as to the right of the Court to take judicial notice of these Licenses is dispelled by the case of *Thornton* v. *United States*, 271 U. S. 414, where the Court said concerning regulations issued by the Secretary of Agriculture pursuant to statutory authority, (p. 420):

> "Under date of June 15, 1916, various regulations were issued by the Secretary of Agriculture. They are not printed in the record, but they are matters of which we may take judicial notice."

Licenses or orders issued by the Secretary since the effective date of the Federal Register Act (July 26, 1935, 49 Stat. 500) must be published in the Federal Register, the contents of which are required by said Act to be judicially noticed. Although the Licenses here involved antedated the effective date of that Act, the provisions thereof as to judicial notice of executive orders may be said to be declaratory of the law as it already existed under the foregoing decisions of this Court.

The Chicago market was the first to be regulated by the Secretary under the Agricultural Adjustment Act of 1933. On July 28, 1933 the Secretary issued License No. 1 for the "Chicago Milk Shed." This License,[7] as amended in certain minor particulars, was in effect from August 1, 1933 until January 1, 1934, at which time it was terminated by the Secretary.

On February 3, 1934 the Secretary issued a new license, "License No. 30 for the Chicago, Illinois, Sales Area," which was in effect, as amended from time to time, from February 5, 1934 to March 2, 1935.[8] This license was in effect during a portion of the period covered by the indictment, *for each of the counts of the indictment under consideration charges a conspiracy entered into in the month of January, 1935.*[9] At the time the order terminating License No. 30 was signed by the Secretary, the Department of Agriculture, through the Agricultural Adjustment Administration, stated:[10]

> "The decision to terminate the Chicago milk license came as a result of a telegram from the Pure Milk Association on February 28, stating that Association had completed contractual relationship with distributors in the sales area and reached full agreement with them, and asking immediate suspension of the license."

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[7] License No. 1 is set forth in Appendix A, *infra* page 29.

[8] Amended License No. 30, in effect from December 2, 1934 to March 2, 1935 is set forth in Appendix B, *infra* page 38.

[9] Count One (R. 11); Count Two (R. 17); Count Four (R. 25).

[10] Official Press Release of U. S. Department of Agriculture No. 1672-35.

B. *The fact that in January, 1935, the government, by its License then in effect, fixed prices to be paid producers and enforced the base-surplus plan of production and payment, is wholly at variance with the allegations of Counts One and Four.*

Count One charges that in January, 1935 the defendants entered into a conspiracy, the object of which was to fix and maintain non-competitive prices to be paid to all producers by all distributors for all fluid milk shipped into Chicago; that such object was effected by a meeting in January, 1935 of the major distributors, the Pure Milk Association and the Associated Milk Dealers, Inc., at which said parties fixed and agreed upon uniform terms and conditions for the purchase of milk, which are referred to therein as "price provisions". (R. 11, par. 47-49.)

By Count Four the defendants are charged with combining, in January, 1935, to restrict and control the supply of fluid milk moving in the channels of interstate commerce into Chicago, through the enforcement of the base-surplus plan of production by the Pure Milk Association and the agreements of the major distributors to pay for fluid milk purchased by them in accordance with said base-surplus plan. (R. 25, 26; par. 88-90.)

But the provisions of the Amended License, in effect in the Chicago market during January, 1935 and until March 2, 1935, reveal that the defendants could not have conspired and combined to fix prices and enforce the base-surplus plan as alleged in Counts One and Four. Said License, and all of the licenses in effect prior thereto, not only fixed prices to be paid producers but also recognized and enforced the base-surplus plan as an integral part of the program thereby established.

As evidence of the fact that the charges of price fixing against the defendants in Count One were identical with the provisions of the Amended License in force in January, 1935 and thereafter, we quote the "price provisions" set forth in paragraph 49 of the indictment (R. 11), and in parenthesis after each such provision we set forth a reference to similar provisions in the Amended License appended hereto.

"(i) Provision as to prices." (Articles V, VIII, pp. 45, 48);

"(ii) Provision as to the basis for computing price." (Articles V, VIII, pp. 45, 48);

"(iii) Provision as to the classification of milk for the purpose of pricing." (Article IV, p. 43);

"(iv) Provision as to the quantity of milk to be purchased through Pure Milk Association." (Article IV, section 4, pp. 44, 45);

"(v) Provision as to the time and place of delivery." (Article XI, section 2, p. 53);

"(vi) Provision as to time and terms of payment." (Articles IX, XII, pp. 50, 53).

All distributors marketing milk in the Chicago Sales Area were licensed subject to the terms and conditions set forth in said Amended License.[11] Distributors were required to purchase milk produced by producers having a base,[12] and the prices to be paid such producers were fixed solely with reference to the bases established therein.[13]

Moreover, this License gave complete recognition to the base-surplus plan established by the Pure Milk Asso-

[11] Appendix B, Art. I, *infra* pages 40, 41.

[12] Appendix B, Art. IV, sec. 4, *infra* pages 44, 45.

[13] Appendix B, Art. IX, Sec. 1, *infra* page 50.

ciation. Bases for producers under said License were allotted as follows:

> For producers who were members of the Pure Milk Association, bases as recorded in the records of such Association;[14] and
>
> For producers who were not members of such Association, bases were allotted by the Market Administrator, which were required to be equitable as compared with the bases of producers who were members of such Association.[15]

It is apparent that the entire scheme of regulation established by these Licenses was founded upon the base-surplus plan previously adopted by the Pure Milk Association.[16]

We submit that the foregoing review of the provisions of said License shows that the defendants could not have combined to fix prices and agreed to enforce the base-surplus plan other than in accordance with its provisions, but any possible doubt on this score is removed by the following section of said License:[17]

> "Any contract or agreement entered into by a distributor prior to the effective date of this License, covering the purchase, delivery and/or sale of milk and its products, shall be deemed to be superseded by the terms and provisions of this License insofar as such contract or agreement is inconsistent with any provision of this License."

It is evident, therefore, that the allegations of Counts One and Four are wholly inconsistent with facts judicially known and that the defendants could not have combined as therein alleged, for any acts of the defendants, with

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[14] Appendix B, Exhibit A, sec. 1, par. 1, *infra* page 58.

[15] Appendix B, Exhibit A, sec. 1, par. 2, *infra* page 58.

[16] Appendix B, Article II, sec. 1, par. 13-19, *infra* pages 42, 43.

[17] Appendix B, Article V, sec. 6, *infra* page 47.

respect to prices to producers pursuant to the base-surplus plan, were required and enforced by the License imposed by the government.

C. *The fact that the Secretary discontinued the fixation of resale prices, while he continued actively to regulate the market, amounts to an approval of the acts charged in Count Two. When the Secretary terminated the Licenses, he approved the continuance of the practices thereby enforced.*

The Licenses which we are considering were issued by the Secretary under authority granted by the Agricultural Adjustment Act as it existed prior to the amendments thereto enacted on August 24, 1935. The original Act,[17] empowering the Secretary to issue such Licenses, contained none of the detailed provisions which were incorporated in the amendments of August 24, 1935 and carried into the Agricultural Marketing Agreement Act of 1937.[18]

Acting under the broad powers granted by the Agricultural Adjustment Act the Secretary, by the first series of Licenses for the Chicago market in effect from August 1, 1933 to January 1, 1934, required all distributors to distribute and sell fluid milk at prices therein scheduled and under the terms and conditions therein set forth.[19] The second series of Licenses for the Chicago Area, in

[17] The pertinent provisions of Section 8 (3) of the Agricultural Adjustment Act of 1933 are quoted in the Licenses. See Appendix A, *infra* pages 38, 39.

[18] The discussion in the government's brief (pp. 47-50) of alleged limitations on the power of the Secretary with respect to the issuance of orders and the provisions to be contained therein, has reference solely to the provisions of the Marketing Agreement Act of 1937.

[19] Appendix A, Art. III, par. 3, *infra* page 32.

effect from February 5, 1934 to March 2, 1935, did not contain any provisions as to resale prices.

Count Two charges that the defendants combined in January, 1935 to fix and maintain prices for the sale of fluid milk by the distributors in the City of Chicago. (R. 17, par. 63.) It is alleged that an agreement fixing resale prices was made in January, 1935. At that time, however, the Secretary was regulating the Chicago market under License No. 30, although he had then discontinued the fixation of resale prices.

What construction then should be placed on the fact that the Secretary discontinued the schedule of resale prices in the License regulating this market? The basic Act under which the Secretary had theretofore fixed such prices remained unchanged. It must therefore be concluded that the Secretary determined either that he lacked power under the Act to fix prices for sales of milk in the City of Chicago for the reason that such sales did not constitute transactions in interstate commerce, or that it was not necessary to fix resale prices in order to effectuate the declared policy of the Act.

If the Secretary determined that he had no power to act with respect to resale prices, considerable weight must be given to his determination as being a practical construction by the administrator of the Act supporting the contention argued here by other appellees that the charges in Count Two did not affect interstate commerce.

On the other hand if the Secretary did not recede from his former position that he had power to fix resale prices, his determination that it was not necessary to do so, while he continued actively to regulate the Chicago market, amounts to an approval of the acts which are alleged in Count Two to have been committed during such time.

For if the acts charged to the defendants concerning resale prices in Count Two tended to prevent the effectuation of the declared policy of the Act by restraining interstate commerce during the period when the License was in force, the Secretary could have fixed such resale prices in the same manner as he had theretofore.

In the court below the government stated that even assuming that all of the activities of the defendants from January, 1935 to March 2, 1935 were legal, clearly their activities since March 2, 1935 were illegal. Although the last series of Licenses were terminated by the Secretary on March 2, 1935, their effect on the charges in the indictment is not limited to the period stated. The act of the Secretary in withdrawing active regulation of the Chicago market on March 2, 1935 was not taken on mere caprice but rather because he was satisfied that conditions in the market were such that the declared policy of the Act would continue to be effectuated without such regulation. For on March 2, 1935, when the order terminating the License was released, the Department of Agriculture stated:[20]

> "The decision to terminate the Chicago milk license came as a result of a telegram from the Pure Milk Association on February 28, *stating that Association had completed contractual relationship with distributors in the sales area and reached full agreement with them,* and asking immediate suspension of the license." [Italics supplied.]

The contracts between the Pure Milk Association and the distributors referred to in the above statement are the agreements which are set forth in the indictment as the means by which the alleged conspiracies were effected. (R. 12, par. 50; R. 17, par. 65; R. 26, par. 91).

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[20] Official Press Release of the U. S. Department of Agriculture, Agricultural Adjustment Administration, No. 1672-35.

It thus appears from facts judicially noticed that the Government during the period prior to March 2, 1935 enforced and approved the acts which the indictment charged as constituting violations of the Sherman Act, and furthermore that governmental enforcement of such practices was withdrawn only when the Secretary was satisfied that the policies put into effect by the Licenses would be continued by contractual relationship of the parties concerned.

D. *The enforcement by the Licenses of the acts charged to the defendants and the continuance of such activities with the approval of the government bars the prosecution of the charges in this indictment.*

What then is the legal effect of the fact that the government compelled the acts charged to the defendants during the period when the Licenses were in force and approved the continuance of such activities when active enforcement under the Licenses was withdrawn?

No citation of authority is necessary for the proposition that an act compelled by an executive order having the force of law cannot be made the subject matter of a charge that some other law was violated. The Agricultural Adjustment Act provided that any person engaged in handling agricultural commodities without a license as required by the Secretary under Section 8(3) should be subject to a fine of not more than $1,000 for each day during which such violation continued. The Secretary had power to suspend or revoke any such license for violations of the terms and conditions thereof. [Act of May 12, 1933, sec. 8(3), 48 Stat. 35.]

It is apparent that to the extent that the acts charged in the indictment were compelled by the penal provisions

of the Act authorizing the Licenses, they were not illegal under the Sherman Act.

Moreover, the fact that the activities of the defendants were continued with governmental approval after the Licenses were withdrawn renders such activities lawful under a rule cited in the government's brief in this case,[21] to-wit:

> "This view is in accord with the rule that governmental approval would render such an agreement lawful. *United States* v. *United States Steel Corp.*, 251 U. S. 417, 446; *Fosburgh* v. *California & Hawaiian Sugar Refining Co.*, 291 Fed. 29, 36, 37."

The defense of entrapment by law enforcing officers is somewhat analogous to the situation here presented. In *Sorrells* v. *United States*, 287 U. S. 435, this Court, in an opinion by Mr. Chief Justice Hughes, said concerning the defense of entrapment by a government prohibition agent in a prosecution for violation of the National Prohibition Act (p. 448):

> "If the requirements of the highest public policy in the maintenance of the integrity of administration would preclude the enforcement of the statute in such circumstances as are present here, the same considerations justify the conclusion that the case lies outside the purview of the Act and that its general words should not be construed to demand a proceeding at once inconsistent with that policy and abhorrent to the sense of justice."

This opinion of the Court is so applicable to the contention we have argued, presenting as it does, not a case of entrapment by a mere government agent but rather one of compulsion by orders issued by the head of an executive department under statutory authority, that we conclude this argument by paraphrasing such opinion.

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[21] See Government's Brief, page 40, footnote 18.

Public policy must preclude the enforcement of the Sherman Act against the defendants whose alleged offense thereunder consisted of activities compelled by law. The same considerations justify the conclusion that *the particular* indictment under review lies outside the purview of the Sherman Act, not merely because of the provisions of the Agricultural Acts[22] as held by the court below, but rather because of the specific exercise of power granted by such Acts in enforcing the activities charged to the defendants in such indictment.

The Sherman Act cannot be construed to demand the prosecution of the defendants by this indictment in the face of facts judicially known to the Court which render such indictment at once inconsistent with public policy and abhorrent to the sense of justice.

CONCLUSION.

For the reasons stated herein, the judgment of the court below as to Counts One, Two and Four of the indictment was correct and should be affirmed.

Respectfully submitted,

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ROY MASSENA,
DONALD N. SCHAFFER,
Counsel for Hunding Dairy Company and Carl W. Hunding.

BEN H. MATTHEWS,
JAMES P. DILLIE,
Counsel for Leland Spencer.

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[22] By "Agricultural Acts" we mean the Act of May 12, 1933 (48 Stat. 31), as amended August 24, 1935 (49 Stat. 750) and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246). See R. 115.

APPENDIX A.

UNITED STATES
DEPARTMENT OF AGRICULTURE
AGRICULTURAL ADJUSTMENT ADMINISTRATION

LICENSE SERIES—LICENSE No. 1

LICENSE FOR MILK—CHICAGO MILK SHED

Issued by the Secretary of Agriculture, July 28, 1933. Effective date August 1, 1933 (12:01 p. m., Eastern Standard Time).

I.

As used in this license, the following words and phrases shall be defined as follows:

[Definitions not copied.]

II.

Whereas it is provided by section 8 of the act as follows:

"Sec. 8. In order to effectuate the declared policy the Secretary of Agriculture shall have power—

"(3) To issue licenses permitting processors, associations of producers, and others to engage in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof, or any competing commodity or product thereof. Such licenses shall be subject to such terms and conditions not in conflict

with existing acts of Congress or regulations pursuant thereto as may be necessary to eliminate unfair practices or charges that prevent or tend to prevent the effectuation of the declared policy and the restoration of normal economic conditions in the marketing of such commodities or products thereof and the financing thereof * * *

"(4) To require any licensee under this section to furnish such reports as to quantities of agricultural commodities or products thereof bought and sold and the prices thereof and as to trade practices and charges, and to keep such systems of accounts, as may be necessary for the purpose of part 2 of this title."

And

Whereas by virtue of the authority vested in the Secretary by the act the Secretary, with the approval of the President, has issued regulations entitled "Milk Regulations, Agricultural Adjustment Administration, Series 1", and

Whereas it is provided by section 200 of said regulation as follows:

"200. *Necessity for issuance of licenses.*—The Secretary of Agriculture having determined that it is necessary to issue licenses, in order to prevent unfair practices or charges that prevent or tend to prevent (1) the effectuation of the declared policy of the act with respect to milk and its products, and (2) the restoration of normal economic conditions in the marketing of milk and its products and the financing thereof, licenses shall be issued under the act, subject to the limitations of and in accordance with the provisions of these regulations, to persons engaged in the handling of milk or products thereof in the current of interstate or foreign commerce"; and

Whereas the Secretary, acting under the provisions of the act, for the purpose and within the limitations therein contained, after due notice and opportunity for hearing to interested parties given pursuant to the provisions of said act and the regulations issued thereunder and after due consideration, has on the 28th day of July 1933 executed under his hand and the official seal of the Department of Agriculture a certain agreement entitled "Marketing Agreement for Milk, Chicago Milk Shed", a copy of which is hereto attached as appendix I; and

Whereas the Secretary finds that the marketing of milk for distribution as fluid milk in the Chicago metropolitan area and the distribution of said fluid milk affects and enters into both the current of interstate commerce and the current of intrastate commerce which are inextricably intermingled; and

Whereas the Secretary finds that said agreement is a marketing agreement between the Secretary and persons engaged in the handling of milk and its products within the meaning of section 8 (2) of the act in the current of interstate commerce and effectuates the declared policy of the act; and

Whereas the Secretary finds that practices and charges contrary to the several provisions of said agreement would constitute unfair practices and charges that would prevent or tend to prevent the effectuation of the declared policy of the act with respect to milk and its products and the restoration of normal economic conditions in the marketing of milk or its products and the financing thereof, and finds that licenses should be issued as hereinafter provided to eliminate such practices and charges,—

III.

Now, therefore, the Secretary of Agriculture, acting under the authority vested in him as aforesaid,

Hereby licenses each and every distributor of fluid milk for consumption in the Chicago metropolitan area to engage in the handling in the current of interstate or foreign commerce of said fluid milk subject to the following terms and conditions:

1. The schedule governing the prices, at which and the terms and conditions under which milk shall be purchased from producers by distributors for distribution as fluid milk, shall be that set forth in exhibit A, which is attached hereto and made a part hereof. Payments to Milk Foundation, Inc., a nonprofit corporation organized and existing under the laws of the State of Illinois, made pursuant to paragraph 4 hereof and like payments to Pure Milk Association made pursuant to membership agreements, shall respectively be deemed part of the price paid to producers.

2. Every distributor of fluid milk shall purchase milk only from producers having a base. Such base shall be the amount reported to such distributor as being in conformity with the plan governing the marketing of milk set forth in exhibit B, which is attached hereto and made a part hereof. Such base shall be reported by the Pure Milk Association (a corporation organized under the laws of the State of Illinois) in the case of producers who are members of the Pure Milk Association, and by a duly authorized representative of such producers in the case of producers not members of the Pure Milk Association. The provisions of this paragraph shall not be applicable in respect of producers not having a base on the effective date of this license, until on and after September 1, 1933.

3. The schedule governing the prices at which and the terms and conditions under which fluid milk shall be distributed and sold by distributors shall be those defined and set forth in exhibit C, which is attached hereto and made a part hereof.

4. The distributors shall not purchase milk from any producer not a member of the Pure Milk Association unless such producer authorizes the purchasing distributor to pay over to the said Milk Foundation, Inc., the same amount per hundred pounds of milk purchased which the members of the Pure Milk Association are then authorizing the distributors to pay over to the Pure Milk Association on behalf of its members, and said purchasing distributor shall simultaneously with making payment to the producer for milk purchased, make payment as aforesaid to said Milk Foundation, Inc. The sums so paid shall be kept as a separate fund by said Milk Foundation, Inc., for the purpose of securing to said producers not members of the Pure Milk Association advertising, educational, credit loss, and other benefits similar to those which are secured by the members of the Pure Milk Association by virtue of their like payments to said Pure Milk Association.

5. The distributors shall severally maintain systems of accounting which shall accurately reflect the true account and condition of their respective businesses. Their respective books and records shall, during usual hours of business, be subject to the examination of the Secretary

(or his duly authorized representative) to assist him in the furtherance of his duties with respect to this license, including verification by the Secretary of the information furnished on the forms hereinafter referred to. The distributors shall severally, from time to time, furnish information to the Secretary on and in accordance with forms to be supplied by him. All information obtained by or furnished to the Secretary pursuant to this paragraph shall remain the confidential information of the Secretary, and shall not be disclosed by him except upon lawful demand made by the President, by either House of the Congress or any committee thereof, or by any court. The Secretary, however, may combine the information obtained from distributors in the form of general statistical studies or data. The Secretary shall issue rules and regulations and prescribe penalties to be imposed in the event of any violations of the confidences or trust imposed hereby.

6. Every distributor shall purchase for sale for consumption as fluid milk only such milk as complies with the standards governing the production, receiving, transportation, processing, and distribution of fluid milk established pursuant to and in accordance with the health ordinances of the city of Chicago, except in those areas within the Chicago metropolitan area where the health ordinances of any other municipality are in full force and effect.

7. The Schedule of Fair Practices, set forth in exhibit D, which is attached hereto and made a part hereof, shall be the Schedule of Fair Practices for distributors in the Chicago metropolitan area.

8. The invalidity of any of the terms and conditions of this license shall not affect in any way the other terms and conditions thereof.

9. This license shall take effect as to every distributor upon the date set forth herein above the signature of the Secretary.

IV.

In witness whereof I, Henry A. Wallace, Secretary of Agriculture, do hereby issue this license in the city of Washington, District of Columbia, on this 28th day of

July 1933, and pursuant to the provisions hereof decl
this license to be effective on and after 12:01 p. m. east
standard time, August 1, 1933.

HENRY A. WALLACE,
Secretary of Agriculture

EXHIBITS TO LICENSE

EXHIBIT A. RULES FOR MILK PRODUCTION, PRICES, AN AMOUNTS

I. PRICES TO BE PAID PRODUCERS.

1. The price to be paid to any producer for milk sh
be determined with reference to the producer's base
determined under exhibit B. For the purpose of det
mining such price, milk delivered by the producers sh
be classified as follows:

Class 1.—An amount equal to 90 percent of the prod
er's base.

Class 2.—An amount equal to 10 percent of the prod
er's base.

Class 3.—The rest of the milk delivered by the p
ducer.

2. The price to be paid any producer for the seve
classes of milk shall be as follows:

Class 1.—$1.75 per hundredweight for milk of 3.5 p
cent butterfat content, subject to a butterfat differen
of 4 cents per one tenth of 1 percent butterfat cont
below or above 3.5 percent.

Class 2.—Three and one half times the average price
the Chicago market for the calendar month during wh
the milk is sold, of 92 score creamery butter sold at wh
sale plus 20 percent of such resulting figure, such to
amount to be adjusted by the butterfat content differen
specified with reference to class 1 milk.

Class 3.—Three and one-half times the average pr
in the Chicago market for the calendar month dur
which the milk is delivered, of 92 score creamery but
sold at wholesale to be adjusted by the butterfat cont

differential specified with reference to class 1 milk, plus 3 cents per hundred weight.

3. All prices to the producer for milk shall be f. o. b. country plants, platforms, or loading stations with, in the case of prices for class 1 milk, a deduction of 1 cent per hundredweight for each 10 miles or part thereof in excess of 70 miles, but not in excess of 100 miles, from the city hall in Chicago, and a further deduction of 1 cent per hundredweight for each 15 miles or part thereof in excess of 100 miles from the city hall in Chicago.

II. DISTRIBUTORS' SUPPLY CONTRACTS

4. Every distributor shall have contracts or other arrangements for the purchase of milk which in the aggregate shall result in the contracting distributor purchasing daily if tendered under such contracts or other arrangements at class 1 prices a quantity of milk computed as follows:

For each wagon or truck route operated during the years 1929 and 1930 and for each wagon or truck route added thereafter by each "distributor": (a) 382½ pounds per each retail wagon or truck route; (b) 1,050 pounds per each wholesale wagon or truck route.

And in addition, 10 percent of the total of such amounts.

5. All milk delivered in any month shall be paid for not later than the 15th of the following month.

EXHIBIT B. RULES FOR CONTROL OF BASIC PRODUCTION

1. For the purposes of this agreement the term "base" as used in respect to any producer, farm, or herd, as the case may be, shall be—

(a) In the case of members of Pure Milk Association, the quantity of milk recorded as such base in the files of Pure Milk Association.

(b) In the case of producers who sell milk within the Chicago metropolitan area and have had no base established by Pure Milk Association, a base shall be allotted by a duly authorized representative of such producers, and bases allotted by such representative shall be equitable as compared with the bases established by Pure Milk

Association for all other products delivering milk in the same Pure Milk Association district.

(c) Producers not now selling milk within the Chicago metropolitan area will be allotted bases (1) in the case of new members of Pure Milk Association by Pure Milk Association, and (2) in the case of nonmembers of Pure Milk Association by a duly authorized representative of such producers, as follows: The base shall be established during the first 90 days in which they produce and market milk within the Chicago metropolitan area and shall be equal to 60 percent of their average daily production during such 90 days.

2. A producer with a base who, as tenant, rents a farm may retain his base; and if he rents a farm for cash, the farm having no base, he is limited to his individual base.

3. A landlord who rents on shares is entitled to the entire base to the exclusion of the tenant if the landlord owns the entire herd on such farm. If cattle are owned jointly, whether in a landlord and tenant relationship or otherwise, the base will be divided between the joint owners according to the ownership of the cattle.

4. The separate bases of any landlord and his tenant or tenants may be handled as a single base.

5. A producer with a base who sells his entire herd to one purchaser at one time may transfer the base to his purchaser, provided that the entire herd is maintained for 6 months consecutively after such sale and transfer on the first farm on which such herd shall have been established.

6. A producer who moves his herd may retain his base only if thereafter milk is produced by him on a farm (1) which has supplied milk for fluid milk in the Chicago metropolitan area within 1 year preceding, or (2) which lies within a territory which has regularly been supplying milk as aforesaid.

7. Where a herd is dispersed for any reason without the base having been transferred with the herd, the producer must replace the herd within 45 days if he is to retain his base.

8. Any producer may combine all bases to which he may be entitled hereunder (for example, a producer with a base who acquires another herd accompanied by

a transfer of the base from the seller may combine the two bases).

9. Any producer who voluntarily ceases to market milk as fluid milk in the Chicago metropolitan area for more than 45 days shall lose his base; and in the event that he resumes production he shall be treated, for the purposes of these rules, as if he were a new producer.

10. A producer whose average daily production for any 3 consecutive months is less than 70 percent of the amount of the base to be sold at class 1 prices (under the present agreement less than 70 percent of 90 percent of base, or, say, less than 63 percent of the total base) will thereby establish a new base equal to such average daily production over such 3-month period.

EXHIBIT C. PRICE SCHEDULE FOR DISTRIBUTORS' SALES

(a) Sales of the following articles in the Chicago metropolitan area made by distributors shall be at the prices hereinafter in this exhibit set forth. Sales of the following articles in bottles shall be made only in bottles of the sizes specified, and, where a butterfat content is specified, only at the specified percentage.

(b) It shall not be deemed a violation of this license to add to the selling price of any article or articles hereinafter in this exhibit specified any sales or occupational taxes imposed by the laws of any State, if permitted by such laws; but any such additions shall be uniform as to all distributors in accordance with such regulations as the Secretary may prescribe not in conflict with local law.

I. WHOLESALE PRICE SCHEDULE

II. PRICE SCHEDULE TO STORES

III. RETAIL PRICE SCHEDULE

[Price schedules omitted as immaterial.]

EXHIBIT D. SCHEDULE OF FAIR PRACTICES

The following practices are considered unfair and shall not be engaged in by distributors or by their officers, employees, or agents:

[Schedule of unfair practices omitted.]

APPENDIX B

Docket No. 1
License No. 30

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL ADJUSTMENT ADMINISTRATION

LICENSE SERIES—LICENSE No. 30

AMENDED LICENSE FOR MILK
CHICAGO, ILLINOIS, SALES AREA
WITH
EXHIBIT A

ALLOTMENT AND REGULATION OF BASES

Issued by the Secretary of Agriculture, December 1, 1934. Effective date December 2, 1934 (12:01 a. m. eastern standard time).

ARTICLE I—PREAMBLE.

WHEREAS, section 8 of the Agricultural Adjustment Act, as amended, provides as follows:

"Sec. 8. In order to effectuate the declared policy, the Secretary of Agriculture shall have power— * * *

"(3) To issue licenses permitting processors, associations of producers, and others to engage in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof, or any competing commodity or product thereof. Such licenses shall be subject to such terms and conditions, not in conflict with existing Acts of Congress or regulations pursuant thereto, as may be necessary to eliminate unfair practices or charges that prevent or tend to prevent the effectuation of the declared policy and the restoration of normal eco-

nomic conditions in the marketing of such commodities or products and the financing thereof. * * *

"(4) To require any licensee under this section to furnish such reports as to quantities of agricultural commodities or products thereof bought and sold and the prices thereof, and as to trade practices and charges, and to keep such systems of accounts, as may be necessary for the purpose of part 2 of this title. * * *"

and

WHEREAS, the Secretary of Agriculture, acting under the provisions of said Act, for the purposes and within the limitations therein contained, and pursuant to the regulations issued thereunder, has on the 3rd day of February, 1934, issued a License for Milk—Chicago Sales Area; and

WHEREAS, R. G. Tugwell, Acting Secretary of Agriculture, acting under the provisions of said Act, for the purposes and within the limitations therein contained, and pursuant to the regulations issued thereunder, has on the 31st day of May, 1934, issued an Amended License for Milk—Chicago Sales Area; and

WHEREAS, the Secretary of Agriculture, acting under the provisions of said Act, for the purposes and within the limitations therein contained, and pursuant to the regulations issued thereunder, has on the 30th day of June, 1934, issued an Amendment to Amended License for Milk—Chicago Sales Area; and

WHEREAS, the Secretary of Agriculture, acting under the provisions of said Act, for the purposes and within the limitations therein contained, and pursuant to the regulations issued thereunder, has on the 17th day of July, 1934, issued an Amendment to the Amended License for Milk—Chicago Sales Area; and

WHEREAS, R. G. Tugwell, Acting Secretary of Agriculture, acting under the provisions of said Act, for the purposes and within the limitations therein contained, and pursuant to the regulations issued thereunder, has on the 21st day of August, 1934, issued an Amendment to the Amended License for Milk—Chicago Sales Area; and

WHEREAS, M. L. Wilson, Acting Secretary of Agriculture, acting under the provisions of said Act, for the purposes and within the limitations therein contained, and

pursuant to the regulations issued thereunder, has on the 30th day of October, 1934, issued an amendment to the Amended License for Milk—Chicago Sales Area; and

WHEREAS, the undersigned finds that the marketing, distribution and handling of milk and the products thereof, covered by this License, are in the current of interstate commerce since the portion thereof which occurs within the bounds of a single State affects and actually and potentially competes with the marketing, distribution and handling of commodities and products which occur between or among several States, and since the commodity, and the products thereof, covered by this License cannot be separated into interstate and intrastate portions, the supply and the marketing, distribution and handling thereof being inextricably commingled, so that it is impossible to regulate the interstate marketing, distribution and handling without also regulating the intrastate marketing, distribution and handling, and the failure to regulate the latter will defeat and obstruct the purposes of the Act with respect to the former; and

WHEREAS, the undersigned has determined to modify the terms and conditions of the said Amended License for Milk—Chicago Sales Area, pursuant to section 8 (3) of the Agricultural Adjustment Act, as amended, and applicable General Regulations of the Agricultural Adjustment Administration; and

WHEREAS, the undersigned finds that this Amended License and the terms and conditions hereof are in accordance with the provisions of section 8 (3) of the said Act and tend to effectuate the purposes of the Act; and

WHEREAS, the undersigned finds that the subject matter of this Amended License is embraced within the scope of a hearing heretofore held on a Marketing Agreement pursuant to applicable General Regulations of the Agricultural Adjustment Administration:

NOW, THEREFORE, the undersigned, acting under the authority vested in him as aforesaid;

Hereby amends and modifies the terms and conditions of the said License and hereby licenses each and every distributor to engage in the business of marketing, distributing or handing milk or cream as a distributor in the Chicago Sales Area, subject to the terms and condi-

tions set forth in this Amended License, hereinafter called the "License."

Article II—Definitions.

Section 1. *Definitions of Terms.* As used in this License, the following words and phrases shall be defined as follows:

1. "Act" means the Agricultural Adjustment Act approved May 12, 1933, as amended.

2. "Secretary" means the Secretary of Agriculture of the United States.

3. "Chicago Sales Area," hereinafter called the "Sales Area," means and includes the city of Chicago and all of that territory lying within the boundaries of Cook County, Lake County and DuPage County, State of Illinois; the townships of Dundee, Elgin, St. Charles, Geneva, Batavia and Aurora, in Kane County, State of Illinois; the township of Oswego in Kendall County, State of Illinois; the townships of Wheatland, DuPage, Plainfield, Lockport, Homer, Troy, Joliet, New Lenox, Frankfort and Crete in Will County, State of Illinois; and the townships of St. John, Ross, North, Calumet, and Hobart in Lake County, State of Indiana.

4. "Person" means any individual, partnership, corporation, association or other business unit.

5. "Producer" means any person, irrespective of whether any such person is also a distributor, who produces milk in conformity with the applicable health requirements in force and effect within the Sales Area for milk to be sold for consumption as whole milk or cream in the Sales Area.

6. "New Producer" means (1) a producer whose milk was neither being purchased by distributors nor being distributed in the Sales Area within ninety (90) days prior to the effective date of this License, or (2) a producer who has ceased to market milk pursuant to the terms and provisions of this License for a period of forty-five (45) consecutive days or more, and thereafter markets milk pursuant to the terms and provisions of this License.

7. "Distributor" means any of the following persons, (irrespective of whether any of such persons is a producer

or an association of producers), wherever located or op
erating, whether within or without the Sales Area, engage
in the business of distributing, marketing, or in any man
ner handling whole milk or cream, in whole or in par
for ultimate consumption in the Sales Area:

(*a*) who pasteurize, bottle or process milk or cream

(*b*) who distribute milk or cream at wholesale o
retail to (1) hotels, restaurants, stores or other es
tablishments for consumption on the premises; (2
stores or other establishments for resale; and (3
consumers;

(*c*) who operate stores or other establishments sel
ing milk or cream at retail for consumption off th
premises;

(*d*) who purchase, market or handle milk or creat
which is sold for resale in the Sales Area.

8. "Subsidiary" means any person of, or over whom
or which, a distributor or an affiliate of a distributor ha
or several distributors collectively have, either directly o
indirectly, actual or legal control, whether by stock owner
ship or in any other manner.

9. "Affiliate" means any person and/or any subsidiar
thereof, who or which has, either directly or indirectly
actual or legal control of or over a distributor, whethe
by stock ownership or in any other manner.

10. "Books and records" means books, records, account
contracts, memoranda, documents, papers, correspondenc
or other data pertaining to the business of the person i
question.

11. "Market Administrator" means the person desig
nated pursuant to article III.

12. "Delivery period" means the period from the firs
to, and including, the last day of each month.

13. "Established base," for each producer, includin
new producers, means that quantity of milk allotted to suc
producer in accordance with the provisions of exhibit A
which is attached hereto and made a part hereof.

14. "Class I percentage" means such a percentage o
the total established bases as the Market Administrato
shall determine at intervals of once for every thre
months, by dividing the average monthly sales of Class

milk for the preceding three months by the total established bases of the market. The Market Administrator may increase or reduce this percentage sufficiently to allow for minor variations in Class I milk.

15. "Class II percentage" means such a percentage of the total established bases as the Market Administrator shall determine at intervals of once for every three months by dividing the average monthly sales of Class II milk for the preceding three months by the total established bases of the market. The Market Administrator may increase or reduce this percentage sufficiently to allow for minor variations in Class II milk.

16. "Class I percentage base" means for each producer, including new producers, the established base of that producer multiplied by the Class I percentage.

17. "Class II percentage base" means for each producer, including new producers, the established base of that producer multiplied by the Class II percentage.

18. "Delivered Class I percentage base" means for each producer, including new producers, that quantity of milk delivered by such producer to distributors which is not in excess of the Class I percentage base of such producer.

19. "Delivered Class II percentage base" means for each producer, including new producers, that quantity of milk delivered by such producer to distributors which is in excess of such producer's Class I percentage base but which is not in excess of the combined Class I and Class II percentage bases of such producer.

Article III—Market Administrator.

[Sections concerning duties and rights of Market Administrator not copied.]

Article IV—Classification of Milk Sales and Uses.

Section 1. *Primary Sales and Uses.* Milk purchased or handled by distributors shall be classified according to its sale and use as follows:

1. Class I milk means all milk sold or distributed by distributors as whole milk for consumption or use in the Sales Area.

2. Class II milk means all milk used by distributors to produce cream for sale or distribution by distributors as cream for consumption or use in the Sales Area.

3. Class III milk means that quantity of milk or milk equivalent:

(a) used by distributors to produce ice cream, ice cream mix, condensed or evaporated milk.

(b) sold by distributors to produce ice cream or ice cream mix.

4. Class IV milk means the quantity of milk purchased, sold, used or distributed by distributors in excess of Class I, Class II and Class III milk.

Sec. 2. *Classification of Sales to Other Distributors.* Milk sold or distributed as milk or cream to another distributor, whether within or without the Sales Area, shall be accounted for by such selling distributor according to the class in which such milk or cream is sold or used by the purchasing distributor. Any distributor purchasing milk and/or cream from another distributor shall, on or before the date fixed for filing reports with the Market Administrator pursuant to article VI, furnish to the distributor from whom he purchased such milk and/or cream, an affidavit as to the quantity of milk and/or cream sold, used or distributed in each of the classes defined in section 1 of this article.

Sec. 3. *Sales Outside the Sales Area.* Milk sold or distributed by a distributor as milk or cream outside the Sales Area, shall be accounted for by such selling distributor as Class I and Class II milk, respectively: *Provided*, That if such selling distributor, on or before the date fixed for filing reports pursuant to article VI, shall furnish to the Market Administrator satisfactory proof that such milk or cream has been utilized for a purpose other than the sale or distribution for ultimate consumption or use as milk or cream, then, and in that event such milk or cream shall be classified in accordance with such other use.

*Sec. 4. *Limitation as to Purchases from Producers without Bases.* No distributor shall purchase milk or

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*As amended by Amendment to Amended License issued by the Secretary of Agriculture on January 16, 1935, effective January 17, 1935.

cream, for Class I or Class II purposes, produced by producers without bases, unless sufficient milk to meet all his Class I requirements, and sufficient milk or cream to meet his Class II requirements up to a quantity of milk or milk equivalent equal to 25 per cent of his Class I milk, is not tendered by producers with bases or by distributors purchasing only from producers with bases.

ARTICLE V—PRICES TO DISTRIBUTORS AND CONDITIONS OF SALES.

Section 1. *Prices.* Each distributor, except as hereinafter provided, shall be obligated to pay, in the manner hereinafter set forth in this License, the following prices for milk, of 3.5 per cent butterfat content, which he has purchased from producers (including new producers), delivered f.o.b. distributor's country plant, platform, or loading station:

**1. Class I milk—$2.00 per hundredweight.

2. Class II milk—For each one hundred pounds of milk —to the average price per pound of 92 score butter at wholesale in the Chicago market, as reported daily by the United States Department of Agriculture for the delivery period during which such milk is purchased, add 10 cents per pound, then multiply by 3.5.

3. Class III milk—For each one hundred pounds of milk —to the average price per pound of 92 score butter at wholesale in the Chicago market, as reported by the United States Department of Agriculture for the delivery period during which such milk is purchased, add 8 cents per pound, then multiply by 3.5.

4. Class IV milk—For each one hundred pounds of milk —3.5 times the average price per pound of 92 score butter at wholesale in the Chicago market as reported daily by the United States Department of Agriculture, for the delivery

** Increased to $2.20 per hundredweight by Amendment to Amended License effective January 17, 1935.

period during which such milk is purchased, to which amount shall be added 4 cents.

Sec. 2. *Adjustments in Cost of Milk to Distributors.* The prices set forth in section 1 of this article shall be subject to adjustment in accordance with the following:

1. If any producer has delivered milk to a distributor at a country plant, platform, or loading station located more than 70 miles from the City Hall in Chicago, there shall be a deduction with respect to his Class I milk of 1 cent per hundredweight for each 10 miles or part thereof in excess of 70 miles, but not in excess of 100 miles from the City Hall in Chicago, and 1 cent per hundredweight for each 15 miles or part thereof in excess of 100 miles from the City Hall in Chicago.

2. Unless the prior written consent of the Market Administrator is obtained to compute the adjustments in the cost of milk to distributors made pursuant to this section, on some other basis, such adjustments shall be computed on the basis that to the extent necessary to supply each distributor with milk sold, distributed or used by him as Class I milk, the milk which was delivered to him at locations in or nearest to the Sales Area was sold, distributed or used by him as Class I milk.

3. On Class I, Class II and Class III milk sold, distributed or used outside of the Sales Area, there shall be an adjustment by (1) the amount of the difference between the Class I, Class II and Class III prices, respectively, specified in section 1, and such prices as the Market Administrator may determine to be the market prices in the market where such milk or cream is sold, distributed or used, and (2) the reasonable cost of transportation from the plant of origin of such milk or cream to such market.

Sec. 3. *Other Licenses for Milk.* If any milk is purchased from producers pursuant to the terms and conditions of this License and sold as milk or cream for ultimate consumption in another market with respect to which a License is in effect pursuant to section 8 (3) of the Act covering such purchase from producers and such sales as milk or cream, then, and in that event the License in effect in the area in which such milk or cream is sold for ultimate consumption shall govern the prices and conditions of such sale.

Sec. 4. *Transaction with Violators.* No distributor shall purchase milk or cream from, or process or distribute milk or cream for, or sell milk or cream to any other distributor who he has notice is violating any provision of this License. Notice in writing from the Market Administrator shall be deemed to be sufficient notice.

Sec. 5. *Purchases by Distributors from Other Distributors.* No distributor shall sell milk or cream to or purchase milk or cream from another distributor for Class I or Class II purposes at less than the respective Class I or Class II prices specified in section 1, subject to adjustments as provided in section 2. If the selling distributor pasteurizes, bottles, or otherwise processes or transports such milk or cream as a service to the buying distributor, a reasonable charge or payment, as the case may be, shall be made therefor.

Sec. 6. *Prior Contracts.* Any contract or agreement entered into by a distributor prior to the effective date of this License, covering the purchase, delivery and/or sale of milk and its products, shall be deemed to be superseded by the terms and provisions of this License in so far as such contract or agreement is inconsistent with any provision of this License.

Article VI—Reports of Receipts and Sales of Milk by Distributors.

Section 1. On or before the 7th day after the end of each delivery period, each distributor (other than those who operate only stores or similar establishments) shall report to the Market Administrator in a manner prescribed by the Market Administrator, with respect to milk or cream received by such distributor, during such delivery period, as follows:

1. The deliveries to each plant from producers supplying such distributor, the total quantity of milk represented by the delivered Class I percentage bases of all such producers, the total quantity of milk represented by the delivered Class II percentage bases of all such producers, and the total quantity of milk represented by the excesses over the delivered Class I and Class II percentage bases of all such producers; and the deliveries of new producers supplying such distributor.

2. The total quantities of milk which were sold, used, or distributed by such distributor as Class I, Class II, Class III and Class IV milk, respectively, including sales to other distributors.

3. The deliveries of milk made to such distributor by any other distributor.

4. Upon first receiving milk from any producer (1) the name of such producer, (2) the date on which such milk was first received, and (3) whether or not such producer is a new producer.

5. Such other information as the Market Administrator may request for the purpose of performing the provisions of this License.

ARTICLE VII—DISTRIBUTORS NOT MARKETING WHOLE MILK.

Section 1. *Distributors Not Marketing Whole Milk.* Any distributor who does not sell or distribute whole milk for ultimate consumption or use in the Sales Area, and who does not purchase milk from producers with bases:

1. Shall pay to producers the Class II price set forth in section 1 of article V for the milk purchased by him which is used to produce cream sold or distributed by him for ultimate consumption in the Sales Area;

2. Shall not be subject to the terms and provisions of articles VIII, IX, X, XII and XIII; but shall submit any or all reports pursuant to article VI upon the request of the Market Administrator.

ARTICLE VIII—DETERMINATION AND NOTIFICATION OF PRICES TO PRODUCERS.

Section 1. *Computations.* With respect to each delivery period, the Market Administrator shall:

1. Compute the total value of the milk reported by each and all distributors pursuant to article VI on the basis of the classification and prices with adjustments as set forth in articles IV and V, respectively, which computations shall not include the milk or the value thereof as purchased by distributors from other distributors, or if classified as emergency milk pursuant to section 3 of article IX.

2. Compute the total adjusted value of all the milk,

the total value of which is computed in paragraph 1, by adding to such total value the adjustments to be made pursuant to section 5 of article IX.

3. Compute the total quantities of milk which represent, respectively, (1) the total of delivered Class I percentage bases, (2) the total of delivered Class II percentage bases and, (3) the total deliveries in excess of the delivered Class I and Class II percentage bases, all of which quantities are included in the computations made pursuant to paragraph 1.

4. Compute the value of the quantity of milk represented by the total Class I delivered percentage bases by multiplying such quantity of milk by the price specified for Class I milk in section 1 of article V.

5. Compute the value of the quantity of milk delivered in excess of the total delivered Class I and Class II percentage bases by multiplying such quantity of milk by the price specified for Class IV milk in section 1 of article V.

6. Compute the total value of the quantity of milk represented by the total delivered Class II percentage bases by subtracting from the amount obtained in paragraph 2 the amounts obtained in paragraphs 4 and 5.

7. Compute the blended price per hundredweight for the quantity of milk represented by the delivered Class II percentage bases by dividing the amount obtained in paragraph 6 by the quantity of milk represented by the total delivered Class II percentage bases, which blended price shall be subject to adjustments as set forth in section 2 of this article.

Sec. 2. *Adjustments for Reserves.* The Market Administrator may adjust the blended price, computed pursuant to section 1 of this article, for the purpose of establishing and maintaining a reserve fund against (1) the failure or delay of distributors to make payments on equalization accounts pursuant to section 2 of article X, (2) errors and discrepancies in reports of distributors, and (3) errors and discrepancies in equalization accounts, including adjustments on delayed reports of distributors: *Provided*, That such adjustments in the blended price for any one delivery period may not, except upon the specific approval of the Secretary, exceed an amount equal to two (2) per cent of the total value of milk reported by distributors for

such delivery period. Such reserve fund shall at no time contain a net amount in excess of ten (10) per cent of the value of the milk reported by distributors for an average delivery period and shall in no event be used by the Market Administrator to meet any costs or liabilities incurred by him under this License. If and when all or any portion of said reserve fund is not necessary to accomplish the purpose for which it was created, equitable distribution thereof shall be made by the Market Administrator to the producers supplying milk for distribution in the Sales Area.

Sec. 3. *Notification of Prices.* On or before the 12th day after the end of each delivery period, the Market Administrator shall notify all distributors, whose reports are included in the computations made pursuant to section 1 of this article, of the blended price computed pursuant to section 1 of this article, as adjusted pursuant to section 2 of this article, and of the Class II, Class III and Class IV prices as calculated by him pursuant to formulae set forth in section 1 of article V.

Article IX—Payments to Producers.

Section 1. *Payments to Producers and New Producers.* Each distributor shall pay to producers (including new producers) on or before the 18th day after the end of each delivery period for milk delivered by such producers during such delivery period subject to adjustments as set forth in this article and deductions as set forth in article XII:

1. The Class I price for the quantity of milk delivered by each producer represented by such producer's delivered Class I percentage base.

2. The adjusted blended price, announced pursuant to section 3 of article VIII, for the quantity of milk delivered by each producer represented by such producer's delivered Class II percentage base.

3. The Class IV price for the quantity of milk delivered by each producer in excess of such producer's delivered Class I and Class II percentage bases.

Sec. 2. *Additional Payments.* Any distributor may, with the prior approval of the Market Administrator,

make payments to producers in addition to the payments pursuant to section 1 of this article: *Provided*, That such additional payments are made to all the producers supplying such distributor with milk of similar quality and grade. No distributor may accept services from or render services to a producer or an association of producers from whom he is purchasing milk without making a reasonable payment or charge, as the case may be, for such services.

Sec. 3. *Emergency Milk.* During any emergency period when the normal supply of milk from producers is not sufficient to meet the Class I and Class II requirements of any distributor, such distributor may, with the prior approval of the Market Administrator, purchase milk for such emergency purposes from producers on terms and conditions other than those set forth in this article and in article XII, but at prices not less than the equivalent of the prices set forth in article V, in which event such milk shall not be included in the computations as provided in article VIII, but shall be reported separately to the Market Administrator by such distributor.

Sec. 4. *Butterfat Differentials.* Each distributor shall pay an amount per hundredweight of milk for each 1/10th of one per cent butterfat content above, and shall deduct a similar amount for each 1/10th of one per cent butterfat content below 3.5 per cent butterfat on all milk on which prices are paid producers pursuant to sections 1 and 2 of this article, as follows:

1. On delivered Class I and Class II percentage bases, four (4) cents per hundredweight; and

2. On all milk delivered in excess of delivered Class I and Class II percentage bases, an amount per hundredweight equal to 1/10th of the average price per pound of 92 score butter at wholesale in the Chicago market as reported by the United States Department of Agriculture for the delivery period during which such milk is purchased.

Sec. 5. *Location Adjustments in Payments to Producers.* With respect to the delivered Class I percentage base of any producer who has delivered milk to a distributor at a country plant, platform or loading station located more than 70 miles from the City Hall in Chicago, each distributor shall deduct from payments to producers to be made pursuant to section 1 of this article, one (1) cent per

hundredweight for each ten (10) miles or part thereof in excess of seventy (70) miles, but not in excess of one hundred (100) miles from the City Hall in Chicago; and one (1) cent per hundredweight for each fifteen (15) miles or part thereof in excess of one hundred (100) miles from the City Hall in Chicago.

Sec. 6. *Distributors' Reports of Payments.* On or before the 20th day after the end of each delivery period, each distributor shall report for such delivery period to the Market Administrator, in a manner prescribed by him, with respect to each producer: (1) his name, (2) his total deliveries of milk as delivered Class I percentage base, delivered Class II percentage base, and excess, respectively, (3) the average butterfat content of milk delivered, (4) the total payment made to such producer, showing all adjustments, additions and deductions, and (5) such other similar information as the Market Administrator shall request.

Article X—Equalization Among Distributors as to Payments to Producers.

Section 1. *Equalization Accounts.* The Market Administrator shall maintain for each distributor whose reports are included in the computations made pursuant to article VIII, records and accounts which shall accurately disclose for each distributor (1) a debit of the total value of milk as computed for each distributor pursuant to paragraph 1, section 1 of article VIII, (2) a credit of the total payments to be made by such distributor pursuant to section 1 of article IX, after giving effect to the adjustments pursuant to section 5 of article IX, and (3) the payments to be made by such distributor to the Market Administrator and payments to be made by the Market Administrator to such distributor.

Sec. 2. *Statement to Distributors and Payment of Balances.* On or before the 14th day after the end of each delivery period the Market Administrator shall render a statement to each distributor whose reports are included in the computations made pursuant to article VIII, showing the debit or credit balance, as the case may be, in the equalization account of such distributor with respect to milk purchased, sold or used during such delivery period. Debit balances shall be paid to the Market Administrator on or

before the 16th day after the end of such delivery period. Any funds so paid to the Market Administrator shall, as soon as reasonably possible be paid out by him pro rata among the distributors having credit balances in proportion to, but only to the extent of, each such credit balance.

ARTICLE XI—PRODUCERS AND PRODUCERS' COOPERATIVE ASSOCIATIONS.

Section 1. *Payments by Cooperatives.* No provision in this License shall be construed as controlling or restricting any producers' cooperative association which meets the requirements of the Capper-Volstead Act and is licensed as a distributor under this License, with respect to the actual deductions or charges, dividends or premiums to be made by such association from and/or to its members: *Provided*, That no such deductions or charges may be made by any such producers' cooperative association from any of its members, to meet a current operating loss incurred by such producers' cooperative association in its processing or distribution operations unless (a) expressly and specifically authorized by any such member to make such deductions or charges for such purpose, and (b) the producers' cooperative association notifies the Market Administrator of the same.

Sec. 2. *Transportation Rights.* Producers shall have the right to deliver milk to plants or platforms of distributors, using any reasonable method of transportation which they, in their discretion, may select. No distributor shall interfere with or discriminate against producers in the exercise of such right. At the request of the Market Administrator, each distributor shall from time to time, submit a verified report stating the actual transportation charges on all milk delivered to him f.o.b. any and all plants, for the purpose of permitting the Market Administrator to review such transportation charges and to determine the reasonableness thereof.

ARTICLE XII—DEDUCTIONS FROM PAYMENTS TO PRODUCERS.

Section 1. *For Market Administration.* Each distributor shall deduct one (1) cent per hundredweight from the payments to be made by him pursuant to article IX in regard to all milk delivered to him during each delivery

period by producers and shall on or before the 18th day after the end of each such delivery period, pay such deduction to the Market Administrator.

Sec. 2. *For Marketing Services.* Upon the request of the Market Administrator each distributor shall, in addition, deduct three (3) cents per hundredweight from the payments to be made by such distributor pursuant to article IX in regard to all milk delivered to him during each delivery period by producers (1) for whom the following services are not currently rendered in a satisfactory manner by a producers' cooperative association: (a) market information, (b) supervision over weights and tests, and (c) to the extent that funds permit, the establishment and maintenance of a reserve fund for the protection against the failure of distributors to make payments for milk purchased; and (2) from whom a substantially similar charge or deduction is not being paid by distributors to a producers' cooperative association for such purposes. Such deductions shall be paid to the Market Administrator on or before the 18th day after the end of each delivery period and shall be expended by him for the purpose of securing services similar to those above named for producers from whose payments such deductions are made except that with the approval of the Secretary, the Market Administrator may notify any producer when the distributor to whom such producer is selling milk is in violation of any of the terms and provisions of this License, and no producer shall be entitled to protection against the failure of such distributor to make payments for milk purchased from such producer thereafter and until otherwise notified by the Market Administrator. All deductions made pursuant to this section shall be kept in a separate account by the Market Administrator and shall in no event be used by him to meet any costs or liabilities incurred by him under this License, except as provided in this section.

Sec. 3. *Agents of Market Administrator.* The Market Administrator may, in his discretion, employ the facilities and services of any agent or agents for the purpose of securing to producers the aforementioned benefits, if such benefits may be efficiently and economically secured thereby. The Market Administrator shall pay over such funds to such agent or agents, if he determines to do so, only upon the consent of such agent or agents to (1) keep its or their

books and records in a manner satisfactory to the Market Administrator; (2) permit the Market Administrator to examine its or their books and records, and to furnish the Market Administrator such verified reports or other information as the Market Administrator may from time to time request; and (3) disburse such funds in the manner above provided.

Sec. 4. *Waiver of Deductions.* The Market Administrator, in his discretion, may at any time waive the foregoing deductions or distribute any balance arising from such deductions, or any part thereof, for any delivery period (in which event the deductions so waived shall not be made by the distributors from payments to producers); the distribution of any such balances shall be equitable (1) among all producers with respect to the amounts paid to the Market Administrator pursuant to section 1 of this article, and (2) among all producers from whom such deductions have been made pursuant to section 2 of this article.

Article XIII—Distributor's Financial Responsibility.

[Sections as to Financial Responsibility not copied.]

Article XIV—Milk Industry Board.

[Sections as to Milk Industry Board not copied.]

Article XV—General Provisions.

Section 1. *Books and Records.* The distributors and their respective affiliates and subsidiaries shall severally keep books and records which will clearly reflect all the financial transactions of their respective businesses and the financial condition thereof.

Sec. 2. *Reports.* The distributors shall severally, from time to time, upon the request of the Secretary, furnish him with such information as he may request, in a manner prescribed by him and/or in accordance with forms of reports to be supplied by him, for the purposes of (1) assisting the Secretary in the furtherance of his powers and duties with respect to this License and/or (2) enabling the Secretary to ascertain and determine the extent to

which the declared policy of the Act and the purpose of this License are being effectuated; such reports to be verified under oath. The Secretary's determination as to the necessity of and the justification for the making of any such reports, and the information called for thereby, shall be final and conclusive.

Sec. 3. *Examination of Books and Records.* For the same purposes as set forth in section 2 of this article and/or to enable the Secretary to verify information furnished him, all the books and records of each distributor and the books and records of the affiliates and subsidiaries of each distributor, shall, during the usual hours of business, be subject to examination by the Secretary. The Secretary's determination as to the necessity of and the justification for any such examination shall be final and conclusive.

Sec. 4. *Confidential Information.* To the extent not otherwise expressly provided by this License, all information in the possession of the Secretary, the Market Administrator, their agents, or any official, which relates to the business or property of any person and which was furnished by or obtained from such person pursuant to the requirements of this License, shall be kept confidential in accordance with the applicable General Regulations of the Agricultural Adjustment Administration.

Sec. 5. *Agents.* The Secretary may by designation in writing, name any person or persons, including officers or employees of the Government, or Bureaus or Divisions of the Department of Agriculture, to act as his agents or agencies in connection with any of the provisions of this License, and he may authorize any such agent or agency to designate or appoint persons, including officers or employees of the Department of Agriculture, to exercise or perform any or all of the powers and functions delegated to them as may be deemed necessary or advisable to accomplish the proper execution or performance of such powers and functions.

Sec. 6. *Separability.* If the applicability of any provision of this License to any person, circumstance or thing is held invalid, the applicability thereof to any other person, circumstance or thing, shall not be affected thereby. If any provision of this License is declared invalid, the validity

of the remainder of this License shall not be affected thereby.

Sec. 7. *Derogation.* Nothing contained in this License is or shall be construed to be in derogation or modification of the rights of the Secretary, or of the United States (1) to exercise any powers granted by the Act or otherwise, and/or (2) in accordance with such powers, to act in the premises whenever such action is deemed advisable:

Sec. 8. *Termination.* In the event this License is terminated or amended by the Secretary, any and all obligations which shall have arisen, or which may thereafter arise in connection therewith, by virtue of or pursuant to this License, and any violations of this License which may have occurred prior to such termination or amendment, shall be deemed not to be affected, waived or terminated by reason thereof, unless so expressly provided in the notice of termination of, or the amendment to this License.

Sec. 9. *Period of Notice.* The Secretary hereby determines that an emergency exists which requires a shorter period of notice than three days, and that the period of notice, with respect to the issuance of this License, which is hereinafter provided, is reasonable under the circumstances.

In witness whereof, H. A. Wallace, Secretary of Agriculture, acting under the provisions of the Agricultural Adjustment Act, as amended, and pursuant to the applicable General Regulations of the Agricultural Adjustment Administration, does hereby execute in duplicate and issue this Amended License in the City of Washington, District of Columbia, on this 1st day of Dec., 1934, and pursuant to the provisions hereof, declares this License to be effective on and after 12:01 a.m., eastern standard time, Dec. 2, 1934.

H. A. Wallace,
Secretary of Agriculture.

Exhibit A

Allotment and Regulation of Bases.

Section 1. *Allotment of Bases.* For the purposes of this License, each producer shall be allotted a base as follows:

1. In the case of producers (excepting new producers) who are members of the Pure Milk Association, hereinafter called the "Association," the bases recorded in the files and records of the Association shall be the bases of such producers. The Market Administrator shall have access to such files and records.

2. In the case of producers who are not members of the Association, bases shall be allotted by the Market Administrator, which bases shall be equitable as compared with the bases of producers who are members of the Association.

3. In the case of producers who have been delivering milk in the Sales Area prior to 90 days before the effective date of this License, but for whom bases have not already been allotted pursuant to paragraphs 1 and 2, bases shall be allotted by the Market Administrator equal to 90 per cent of such producer's average deliveries of milk during the first three months, excepting May and June, for which records of such producer's deliveries are requested by and reported to the Market Administrator.

4. In the case of each new producer, a base shall be allotted by the Market Administrator which shall be equal to 80 per cent of the total delivery of milk by such new producer for each of the first three months, excepting May and June, during which such new producer delivers milk to distributors. For any part of May or June falling within such three months, the base for each new producer shall be equal to 60 per cent of his total delivery of milk. After such new producer has delivered milk to distributors for three months, he shall be allotted a base by the Market Administrator equal to the average of his base during such three months.

Sec. 2. *Revision of Bases.* The Market Administrator may make such revisions in the bases of producers who are not members of the Pure Milk Association as he may

from time to time, deem necessary or advisable, to the end that such bases may be equitable as among producers.

Sec. 3. *Reports by Distributors.* Upon the request of the Market Administrator, each distributor, who has not already submitted reports containing the information required in this paragraph, shall, within ten days after receiving such request, submit to the Market Administrator written reports, verified under oath, containing the following information with respect to each producer, who has delivered milk to such distributor; for each calendar month during the years 1933 and 1934 or such portion thereof as the producer may have delivered milk, (1) the total pounds of delivered milk, (2) the number of days in each month upon which deliveries were made.

Sec. 4. *Announcement of Bases.* When bases are established for producers pursuant to paragraphs 2, 3, and 4 of section 1, or revised pursuant to section 2 of this exhibit, the Market Administrator shall notify each distributor of the bases of such producers who are delivering milk to each such distributor.

Sec. 5. *Tenure and Transfer of Bases.* The following rules shall govern the tenure and transfer by producers of all bases allotted pursuant to this exhibit:

1. Any producer who voluntarily ceases to market milk pursuant to the terms and provisions of this License for a period of more than forty-five (45) consecutive days shall forfeit his base.

2. Because of the lack of feed resulting from the severe drought in the Chicago production area, any producer may upon notice to the Market Administrator, discontinue the deliveries of milk to distributors in the Sales Area at any time after the effective date of this License and retain his base notwithstanding the provision in paragraph 1, provided that such producer's base be not transferred to another person, and that he resumes such deliveries on or before June 1, 1935.

3. A base may be transferred to another person upon the sale and transfer of the producer's entire herd to such person: *Provided, however,* That such base so transferred shall be forfeited unless the entire herd is maintained for six months consecutively after such sale and

transfer. Such transfer shall be reported to the Market Administrator.

4. A producer with a base, whether landlord or tenant, may retain his base when moving his entire herd from one farm to another farm.

5. A landlord who rents on shares is entitled to the entire base to the exclusion of the tenant, if the landlord owns the entire herd. Likewise, the tenant who rents on shares is entitled to the entire base to the exclusion of the landlord if the tenant owns the entire herd. If the cattle are jointly owned by tenant and landlord, the base shall be divided between the joint owners according to the ownership of the cattle if and when such joint owners terminate the tenant-landlord relationship.